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ABSTRACT

The 1977 Supreme Court decision in "Milliken v. Bradley," involving the Detroit public schools and the state of Michigan, held that federal courts possess the authority not only to order the implementation of educational program components as part of a desegregation remedy, but also to assess a portion of the cost of such components against the state treasury. Since 1977 similarly comprehensive desegregation plans have been ordered and/or analogous claims of responsibility and extraschool district liability advanced in litigation involving a number of other communities. These cases have presented a host of difficult factual, legal, and public policy issues not expressly resolved by the Supreme Court in "Milliken." These issues involve (1) the expanding nature of remedial regimes, (2) the theories and bases of state and local liability upon which the funding of these remedies may be predicated, and (3) the means by which such obligations may be financed and the authority of the court to mandate a particular source or method by which the needed resources are to be marshalled. This paper provides a general survey of selected issues and the manner in which they have been addressed and resolved to date by some of the trial and appellate courts presiding over "Milliken's" progeny. A hierarchy of judicial actions organized according to their intrusivenes is also synthesized from the case law. (MLF)

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Trends in School Desegregation Litigation and the Financing of Remedial Decrees

Charles B. Vergon

Introduction

In a 1977 case involving the Detroit public schools and the state of Michigan, the United States Supreme Court held that federal courts possess the authority not only to order the implementation of educational program components as part of a desegregation remedy, but also to assess a portion of the cost of such components against the state treasury. This decision in *Milliken v. Bradley* [1] has had a substantial impact on the scope and nature of the remedial regime sought and ordered in subsequent school desegregation cases, and on the method by which associated costs are computed and financed by local, state, and other co-defendants.

In the case of Detroit, the Supreme Court's affirmance of the lower court's order resulted in the adoption and implementation of a comprehensive remedial plan consisting of thirteen educational or desegregation-enabling components, in addition to the reassignment of pupils. In implementing this plan over a ten year period, the school district will ultimately benefit from the infusion of an estimated $60-75 millon of previously unappropriated state funds. This represents the state's 50% share of the cost of four of the thirteen court-mandated components and the construction of two new vocational education centers.[2] During this same period, the local school board will have earmarked and committed an even greater sum of its own resources to the broad program of educational reform and renewal mandated in

1. 433 U.S. 267 (1977).

2. Estimates of author based on extrapolation of reported data. While this represents a substantial sum, it is important that such costs be viewed from a contextual perspective. In the case of Detroit for instance, the average annualized state contribution of approximately $6 million represents just slightly over one percent of the district's annual operating budget or roughly $27 per student. Naturally it represents an even smaller fraction of the $1.5 billion allocated annually by the state for public elementary and secondary education. Given the propensity for desegregation costs to be politicized, such referents may provide a more meaningful basis for policy analysis than the actual dollar amounts involved.

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the court order.

Since 1977 similarly comprehensive desegregation plans have been ordered and/or analogous claims of responsibility and extra-school district liability advanced in litigation involving a number of other communities. Illustrative of these actions are ones brought by or on behalf of school districts serving Benton Harbor, Buffalo, Cincinnati, Cleveland, Columbus, Indianapolis, St. Louis and Wilmington/New Castle County. The cost of desegregation and educational components mandated in several of these communities has already exceeded on a per annum basis, and will undoubtedly over the course of court-supervised implementation dwarf those incurred in Detroit, resulting in potentially significant strains on the capacity of both state and local school districts to fund their respective shares.[3]

These cases, however, have not only raised questions concerning the financial capacity of the parties, but have also presented a host of difficult factual, legal and public policy issues not expressly resolved by the Supreme Court in *Milliken*. These issues involve: (1) the expanding nature of remedial regimes; (2) the theories and bases of state and local liability upon which the funding of these remedies may be predicated; and finally, (3) the means by which such obligations may be financed and the authority of the court to mandate a particular source or method by which the needed resources are to be marshalled.

Because of the protracted and exceedingly complex nature of much of the desegregation litigation involved, and constraints governing an article of this length, it will only be possible to provide a general survey of selected issues and the manner in which they have been addressed and resolved to date by some of the trial and appellate courts presiding over *Milliken's* progeny. This survey is divided into three sections, one corresponding to each of the major issue constellations: remedies, liabilities, and the marshalling of resources.

Comprehensive Remedial Regimes

With increasing frequency, federal courts are ordering comprehen-

3. *See, e.g.*, Liddell v. Board of Educ. of St. Louis, 567 F. Supp. 1037, *aff'd in part and reversed in part*, 731 F.2d 1294 (8th Cir.), *cert. denied*, 105 S. Ct. 82 (1984). (Estimated expenditures for 1983-84 school year ranged from $38 to $100 million; actual expenditures approximated $45 million.) *See generally* Colton, Urban Desegregation Cost (paper presented to the American Educational Research Association, April 1975) and Hoffman, A Study of the Cost of Implementing Desegregation Plans in Sixteen Major Cities in Report of the Ohio General Assembly Joint Committee on School Desegregation (1978).

sive remedial regimes in school desegregation cases.[4] These comprehensive plans generally consist of a series of components, each designed to meet a need associated with equalizing educational opportunity in a complex institutional setting. Four major categories of components found in such structured injunctions include pupil reassignment components, remedial educational components, organizational enabling components, and program financing components. Each category of components is briefly described next.

Pupil reassignment related components are those designed to overcome pupil segregation and the racially-identifiable nature of buildings. They may consist of mandatory reassignment provisions incorporating techniques such as pairing and clustering, or voluntary programs that utilize magnet or specialist schools to permit varying degrees of pupil or parental choice. Irrespective of which of these two basic approaches or combination of them is employed, transportation services are frequently required and thus represent another prevalent pupil reassignment-related component.

Educational components are those designed to enhance the quality of educational programs and provide academic support services to students who have been the victims of past segregation, discrimination and educational inequities. Programs within this component may include ones focusing on remedial reading and communications; pre-school and all-day kindergartens; multicultural and bilingual education; guidance, counseling and testing; co-curricular and cooperative learning experiences; extracurricular activities; and student rights and responsibilities.

Organizational enabling components are those which, although they do not primarily address the enhancement of education, serve to prepare the organization and those affiliated with it for the impending adjustment represented by desegregation. These adjustments may affect organizational structure, institutional policies and a variety of operating procedures. Enabling components frequently include programs designed to enhance staff knowledge, skills and atti-

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4. *See, e.g.*, Morgan v. Kerrigan, 401 F. Supp. 216, *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976); Evans v. Buchanan, 447 F. Supp. 982, *aff'd*, 582 F.2d 750 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980); Reed v. Rhodes, 455 F. Supp. 569, *aff'd in pertinent part*, 607 F.2d 714 (6th Cir.), *cert. denied*, 445 U.S. 935 (1982); Berry v. School Dist. of Benton Harbor, 515 F. Supp. 344, *aff'd*, 698 F.2d 813 (6th Cir. 1983); United States v. Board of School Comm'rs., 506 F. Supp. 657, *aff'd*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980); and Liddell, *supra* note 3. For commentary treatment on institutional reform, *see* Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1282 (1976); Kirp, *Legalism and Politics in School Desegregation*, Wis. L. Rev. 924 (1981); Note, *Implementing Institutional Reform*, 91 Harv. L. Rev. 428 (1977); H. Kalodner & J. Fishman, Limits of Justice: The Court's Rule in Desegregation (1978) and W. Hawley, Effective School Desegregation (1981).

tudes; prepare and orient students for their reassignment; inform, educate and actively involve parents and community in the desegregation process; and establish mechanisms for the monitoring and evaluation of desegregation implementation, as well as the resolution of disputes that may arise as a result of the desegregation process. In the case of multidistrict plans, one or more components focusing on governance and interdistrict communication and coordination are also commonly incorporated.

Financing Components represent the fourth generic category of provisions found with increasing regularity in remedial decrees. Financing components focus on the cost of implementing the foregoing remedial programs, prescribe the responsibility of the parties and discuss the means by which financing is to be ensured. These components, which are of relatively recent origin, and sometimes viewed as antithetical to the authority and role of the judiciary,[5] compensate for a critical deficiency in earlier educational reform actions. This deficiency has been the failure to provide or facilitate the effective marshalling of resources necessary to carry out the terms of mandated reform. Such financing components may range from simple orders directing that a particular party implement one of the prescribed educational components, without specifying the amount of the obligation or the source from which it is to be satisfied, to exceedingly detailed orders which specify not only the dollar amount of the obligation, but the source from and means by which the necessary revenues are to be provided by the liable party. Naturally, there are a number of intervening forms such financing components may take.

Because such comprehensive orders — with their educational, enabling and financing in addition to reassignment components — represent a radical departure from those narrow and primarily negative injunctions issued at the time of *Brown v. Board of Education of Topeka,*[6] it is important to briefly review the legal history and precedent from which they have grown. In *Brown* the Supreme Court focused its exclusive attention on the fundamental constitutional question of whether state-sanctioned segregation represented a denial of equal protection even though schools serving whites and blacks were equal in terms of tangible factors such as courses and facilities. Having answered that question in the affirmative, the Court in *Brown II* turned its attention to remedy. In doing so, however, the Court refrained from prescribing detailed remedial decrees, instead

5. Questioning the legitimacy and capacity of courts in institutional reform actions generally, *see, e.g.*, Glazer, *Toward an Imperial Judiciary,* 41 Pub. Interest 104 (1975) and D. Horowitz, The Courts and Social Policy (1977).

6. 347 U.S. 483 (1954).

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electing to provide some general directions for lower courts to follow in formulating orders designed to ensure the admittance of blacks to public schools on "a nonracial basis with all deliberate speed." In accomplishing this, equitable principles were to be applied, characterized by practical flexibility and a facility for adjusting public and private needs.[7]

While the objective was to open formerly white schools to blacks, the Court repeatedly acknowledged that the "[F]ull implementation of these constitutional principles may require the solution of varied local problems" including those associated with factors such as administrative arrangements, the physical conditions of buildings, personnel matters, admissions policies and the revision of local policies and practices that inhibit desegregation. Lower federal courts were also advised to consider "the adequacy of any plans proposed to meet these problems and to effectuate a transition to a racially nondiscriminatory school system." Jurisdiction would be retained during the transition period.[8]

That the transition to a system of public education freed from discrimination would involve more than the opening of formerly white schools to black students became increasingly evident in the late 1960's and early 1970's as the Court mandated the elimination of discrimination "root and branch" from "every facet of school operations — faculty, staff, transportation, extracurricular activities and facilities."[9] The next step in the progression toward more expansive remedial orders came in 1976 when, in the context of the Detroit desegregation case, the Supreme Court upheld the authority of federal district judges to order ancillary relief in the form of educational components designed to remedy the effects of past segregation and assure the success of the current desegregation effort. In doing so, the Court acknowledged that, "Pupil assignment alone does not automatically remedy the impact of previous unlawful educational isolation; the consequences linger on and can be dealt with only by independent measures."[10]

While the Court expressly observed that the district court's order was not a blueprint for other cases, the imprimatur of the Court on an expansive remedial regime and the prospects of a non-school district party assuming a substantial portion of the associated cost, all but drowned out the Court's cautionary admonition. In successive

7. 349 U.S. 294 (1955).
8. *Id.* at 300-301.
9. Green v. New Kent County, 391 U.S. 430, 438 (1968) and Swann v. Charlotte-Mecklenburg, 402 U.S. 1, 19 (1971).
10. Milliken, 433 U.S. at 287-88.

cases at the federal district court level, the *Milliken* regime was proposed and contended for by school district after school district and in some instances by plaintiffs and even the court and its operative experts and masters.

Nature and Bases of Local and State Liability

Paralleling this expansion of remedial decrees in school desegregation and other institutional reform actions has been the development of new principles and precedents pertaining to governmental liability for constitutional torts and civil rights infringements. These precedents have tended to constrain traditional protections and immunities enjoyed by governmental authorities, making them more accountable for their policies and actions.[11] What governmental authorities represent potential parties in school desegregation actions? On what theory and bases may they be held liable? What is the nature of their financial responsibility? How is the responsibility apportioned among multiple parties?

Governmental Parties and Bases of Liability

As has always been the case, local school boards and educational officials continue to be routinely named as defendants in school desegregation actions in all regions of the county. Upon proper proof of unconstitutional conduct, they are the parties primarily responsible for designing, and implementing an acceptable desegregation plan. Unless other public agencies and officials have significantly contributed to current levels of unlawful segregation, the responsibility for financing the remedial plan also falls exclusively on the local school district. The vast majority of all school desegregation actions fit this model of local school district liability and financial responsibility.

In those jurisdictions where school systems are unified with municipal governments for purposes of appropriations and budgetary approval processes, an array of local, non-school district defendants may also be named as parties.[12] Those local officials most frequently named include the mayor, city council, housing authorities, and, of course, the treasurer. They may be made defendants either for purposes of demonstrating a constitutional violation on their part, or as

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11. *See generally, e.g.*, Edelman v. Jordan, 415 U.S. 651 (1974); Wood v. Strickland, 420 U.S. 308 (1975); Milliken v. Bradley, 433 U.S. 267 (1977); Monell v. New York Dept. of Social Servs., 436 U.S. 658 (1978); and Owens v. City of Independence, 446 U.S. 993 (1980).

12. *E.g.*, Arthur v. Nyquist, 415 F. Supp. 904, *aff'd in pertinent part*, 573 F.2d 134 (2nd Cir.), *cert. denied*, 439 U.S. 860 (1978).

a necessary party to ensure the adequacy and full implementation of the required remedial plan.

While southern and border states have historically been named as defendants because of their explicit statutes requiring or permitting pupil segregation at the time of *Brown,* it has only been more recently that northern and western states have been accorded similar attention and status in desegregation actions. Today states in all regions of the country are almost equally likely to be named as codefendants in major desegregation suits. This is the result of several factors.

One factor is that plaintiffs have become increasingly cognizant of, and adept at demonstrating, the interrelationship and impact of policies and actions taken at the local, state, and federal level. Secondly, evolving theories of governmental liability in the area of constitutional torts have provided the necessary legal foundation for proceeding against non-school district parties. Finally, the very nature and magnitude of the remedies, the intergovernmental coordination they necessitate, and the prospects that the associated costs may be spread among several parties, have made the naming of states as codefendants common practice.

A variety of state governmental entities and officials have been named in such actions including governors, attorney generals, state boards of education, superintendents of public instruction and treasurers. The designation of state defendants depends in part on which theory of state liability the facts permit and the plaintiffs elect to pursue. While distinguishing these theories and standards may be useful for purposes of conceptual clarity, it should be recognized that liability is frequently predicted on proofs which may be utilized in conjunction with more than one theory and courts that have often relied implicitly, if not explicitly, on multiple theories or bases of liability. Under these theories, the liability of state level entities or officials may be predicated on their *direct actions* which create or perpetuate local segregation; their *indirect actions* which purposefully ratify or acquiesce in the de jure practices of school districts over which they exercise supervisory authority; or their prior adoption of *mandatory indemnification provisions* in their respective state school or revenue codes.

Direct state participation in purposefully segregatory actions has been relatively common, both in the pre-1954 era and more recent times. Examples include: (1) ordering the closure of or discontinuation of state support for any school district which desegregates;[13] (2)

13. Griffin v. Prince Edwards County, 377 U.S. 218 (1964).

failing to rescind or affirmatively combat the consequences of pupil segregation statues;[14] (3) enacting governmental or school district consolidation or reorganization statutes which restrict the participation of minority identifiable districts;[15] (4) adopting measures which effectively nullify locally adopted desegregation plans or restructures governmental decision-making to make such plans more difficult to realize;[16] or (5) approving school siting, construction and bonding proposals.[17] Naturally, except where the state defendant has failed to rectify a previously adjudicated constitutional violation, plaintiffs must allege and prove discriminatory intent on the part of the state pursuant to standards established by the Supreme Court in the mid-1970's.[18]

Even when state level agencies and officials are not directly involved in conduct which creates purposeful segregation at the school district level, they may nevertheless be held jointly liable with local authorities under certain circumstances. While courts have generally rejected the application of the theory of vicarious liability in school desegregation and section 1983 civil rights actions,[19] they have not hesitated to hold governmental officials liable for their indirect actions which purposefully and materially contribute to current levels of segregation or discrimination. Thus, under one appellate court's formulation of the applicable standard,[20] a state may be held liable for its indirect participation in segregatory actions of local school officals where it can be demonstrated that the state: (1) possessed actual or constructive knowledge of the potentially unconstitutional conditions in the local school district; (2) purposefully failed to carry out a constitutional or statutorily imposed duty to investigate or ensure compliance with applicable state or federal antidiscrimina-

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14. *E.g.*, Adams v. United States, 620 F.2d 1277 (8th Cir.) (enbanc), *cert. denied*, 449 U.S. 826 (1980).

15. *E.g.*, Evans v. Buchanan, 393 F. Supp. 428 (D. Del. 1975); United States v. Board of School Comm'rs, 456 F. Supp. 183, *aff'd*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980).

16. *E.g.*, Bradley v. Milliken, 433 F.2d 897 and *reaffirmed*, 484 F.2d 215 (6th Cir. 1973), *rev'd on other grounds*, 418 U.S. 954 (1974).

17. *Id.*

18. Keyes v. School District No. 1, 413 U.S. 189 (1973); Washington v. Davis, 426 U.S. 229 (1976) and Arlington Heights v. Metro Housing Develop. Corp., 429 U.S. 252 (1977).

19. Rizzo v. Goode, 423 U.S. 362 (1976); Monell v. New York Dept. of Social Servs., 436 U.S. 658, 694, n.58 (1978); Arthur v. Nyquist, 573 F.2d 134 (2nd Cir. 1978); Reed v. Rhodes 662 F.2d 1219 (6th Cir.), *cert. denied*, 455 U.S. 1018 (1982); Penick v. Columbus Bd. of Educ., 583 F. 2d 787 (6th Cir. 1978), *cert. denied*, 455 U.S. 1018 (1982); and United States v. Board of School Comm'rs, 573 F.2d 400 (7th Cir.) *cert. denied*, 439 U.S. 824 (1978).

20. Reed, 662 F.2d 1219 (6th Cir.).

tion laws; and (3) continued to provide funds or otherwise ratified or acquiesced in the unconstitutional actions of the district in question.

Based primarily if not exclusively on such analyses, the states of Michigan and Ohio have been held liable for unconstitutional conditions found to exist in Kalamazoo and Cleveland and Columbus respectively,[21] although not necessarily in all communities within their jurisdictions.[22] In the case of Cleveland alone, the state has been held liable for in excess of $60 million of remedial programming during a five year period commencing in 1978.[23]

Finally, in a limited number of jurisdictions, a mandatory reimbursement statute may serve to create a de facto standard of strict liability on behalf of the state. In these jurisdictions a state may be held liable for the unconstitutional actions of its local school district agents whether their actions are known, unknown, or even unknowable to the state, and irrespective of whether or not the state has taken any measure countenancing the unconstitutional conduct. Such a measure requiring the state to reimburse local governmental entities for costs incurred in implementing new state and federal legal mandates, including those imposed by court order, was enacted in California in 1973 as part of a tax limitation act.[24] Under its provisions, the state provided the Los Angeles Unified School District $103 million of desegregation support in one recent year.[25]

Under one or a combination of these theories and standards a number of states have been found to be constitutional wrongdoers and therefore liable for all or some portion of the cost of the comprehensive remedial plan ordered by the court. Several states, however, have been found to have conducted themselves in a constitutionally appropriate manner, thereby liberating themselves from any affirmative remedial duties or monetary liability.[26] Massachusetts was not only declared to be free from constitutional infirmity in the conduct of its affairs in relation to the Boston public schools,[27] but was actually awarded monetary relief from the Boston school committee for expenses incurred in monitoring that district's compliance with the federal court order under which it has functioned since

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21. *See* Reed and Penick, supra note 19 and Oliver v. Board of Educ. of Kalamazoo, 368 F. Supp. 143, *aff'd*, 508 F.2d 178 (6th Cir.), *cert. denied*, 421 U.S. 963 (1975).

22. *E.g.*, Alexander v. Youngstown Bd. of Educ., 454 F. Supp. 985, *aff'd*, 675 F.2d 787 (6th Cir. 1982).

23. Calculations of the author based on review of unpublished funding orders.

24. Cal. Rev. & Tax. Code § 2201 (West Supp. 1984).

25. Figure attributed to Los Angeles School Attorney Peter James, School Law News, Sept. 9, 1983, at 1.

26. Arthur, 573 F.2d at 134.

27. Morgan v. Hennigan, 379 F. Supp. 410, *aff'd sub nom.*, Morgan v. Kerrigan, 509 F.2d 580 (1st Cir.), *cert. denied*, 421 U.S. 963 (1975).

1974.[28] In finding an inadequate basis for state liability at the time of the initial trial, the federal district court observed that the state had enacted a racial imbalance act, monitored district compliance, required the submission of corrective plans to the state commissioner, instituted state court action against the district, and on occasion withheld over $28 million of state aid to the Boston schools as a means of encouraging compliance with applicable state and federal laws.[29] Even though such measures failed to prove fully effective and negate the need for federal court action, the court found that the state had acted affirmatively and in good faith in fulfillment of its statutory duties.

Seldom has the federal government been named as a primary defendant in a school desegregation action even though plaintiffs have demonstrated the significant impact that various federal policies have had on housing patterns and in turn on local school segregation.[30] The fact that constitutionally-based actions have gone largely unfiled may be explained in part by the federal government's categorical aid program, which between 1971 and 1981 made available on the average of $125 million of financial assistance to newly desegregated school districts.[31] As the result of the enactment of the Educational Consolidation and Improvement Act of 1982,[32] however, this aid program was rolled into the new federal block grant program, effectively reducing by dramatic proportions the amount of financial support available to desegregating urban districts.[33] This development spurred new interest in actions against the federal government, including a unique contractually-based suit initiated by the Chicago Board of Education.[34] During the just ended 89th Congress, legislation was enacted reauthorizing categorical federal desegregation aid for magnet school programs.[35]

Nature of Liability in Multi-Party Actions

Federal courts generally apply traditional tort principles in deter-

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28. Morgan v. McDonough, 554 F. Supp. 169 (D. Mass. 1982).

29. Morgan, 379 F. Supp. at 476-77.

30. *See, e.g.*, Liddell, 667 F.2d 643 (8th Cir. 1981).

31. Emergency School Aid Act, Pub. L. No. 92-318 § 701, 86 Stat. 354. *See, e.g.*, Liddell, 667 F.2d at 654 (upholding district court denial of motion to add United States, as defendant party, in part because of the past and presumed future availability of federal ESAA support).

32. 20 U.S.C. § 3801.

33. Kearney, *A Study of Black Grants in Selected States*, 12 Breakthrough 1 (Winter 1984).

34. United States v. Chicago Bd. of Educ. 554 F. Supp. 912, 567 F. Supp. 272, *aff'd in part and vacated in part*, 717 F.2d 378 (7th Cir. 1983), *on remand*, 588 F. Supp. 132, *vacated and remanded*, No. 84-2405 (7th Cir. filed Sept. 26, 1984).

35. Pub. L. No. 98-377.

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mining the nature of liability, and where appropriate, the apportionment of cost. Thus a party may be declared to be severally or individually liable for the cost of an entire remedial plan or constituent component of the plan where the party is the exclusive or primary constitutional wrongdoer relative to the condition to be corrected. The state is frequently held singularly liable for the entire cost of interdistrict relief, including expenses associated with transfer tuition, pupil aid maintenance, and transportation services.[36]

In the case of intradistrict desegregation relief, however, where both the state and local school officials have contributed significantly to the condition to be remedied, both may be held jointly liable and the cost apportioned between the parties according to one of several approaches. Most commonly, the court directs that the costs be shared equally between the parties for the components for which joint liability is found.[37] Alternatively, the court may apportion cost according to some pre-existing statutory formula, requiring the state for instance, to pay a set percent of the cost of transportation for desegregation purposes where the state is already so obligated under state school aid legislation.[38]

Although the equal sharing of cost or apportionment according to statutory formula are most common, on occasion courts adopt another approach, such as apportioning cost according to relative culpability.[39] Because the nature of the tortous conduct and the difficulty of isolating and attributing a measureable consequence to the types of events in question, this approach is seldom employed. Finally, some courts in arriving at a determination regarding the apportionment of cost take into account the relative financial capacity of the parties.[40]

In addition to finding parties liable and apportioning cost among them, the court also determines the duration of the financial obligation. Here again there appears to be no singular approach employed by federal district judges. Some elect to use a fixed term approach, declaring at the outset that court jurisdiction, and by implication the funding obligation of liable parties, shall run for a set number of

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36. *See, e.g.*, Evans v. Buchanan, 447 F. Supp. 982, *aff'd in pertinent part*, 582 F.2d 750 (3d Cir.), *cert. denied*, 446 U.S. 923 (1980); United States v. Board of School Comm'rs, 456 F. Supp. 183, *aff'd*, 677 F.2d 1185 (7th Cir.), *cert. denied*, 459 U.S. 1086 (1980); and Liddell v. Board of Educ. of St. Louis, 491 F. Supp. 351, *aff'd*, 677 F.2d 626, *reaffirmed in pertinent part*, 731 F.2d 1294 (8th Cir.), *cert. denied*, 105 S. Ct. 82 (1984).

37. *E.g.*, Liddell, 731 F.2d 1294.

38. *E.g.*, Bradley, 411 F. Supp. 937(6th Cir. 1975); *but see* Board of School Comm'rs, 677 F.2d 1185 (court overrides statutory formula).

39. Berry, 515 F. Supp. 344.

40. Evans, 447 F. Supp. 982.

years and terminate at a date certain unless otherwise ordered by the court.[41] Such an approach is particularly common in actions resolved by consent decrees. Another approach that provides for a reasonable level of objective certainty regarding the financial obligation of the parties is the practice of simply setting a maximum dollar amount which may not be exceeded over the life of the court order.[42]

A more prevalent approach, however, is for the court simply to provide that the obligation shall continue until unitary status is attained. More often than not, unitary status is not predefined in the orders of the court and thus it becomes a highly subjective standard which provides little direction to the district regarding what must be accomplished before this desired status is attained, or to the state concerning the duration and probably amount of its exposure.[43]

While such a subjective standard is most common, federal courts occasionally establish objective standards by which the parties may evaluate their progress and ultimately the attainment of unitary status. These objective measures may be input, process or outcome-oriented in nature. For instance, an objective outcome measure might call for the elimination of all racially identifiable schools as determined from an analysis of school demographic data or student attainment of a prescribed level of proficiency on state administered reading and math tests.[44]

Naturally, the method used to determine the duration of the financial obligation of the parties will have a significant bearing not only on the amount of ultimate exposure but also on the extent to which the court and parties can use the standard as a means of directing and concentrating compliance efforts.

The Marshalling of Financial Resources

Remedial orders vary not only in terms of their comprehensiveness and the number and nature of liable parties, but also with respect to the extent to which they dictate the source or manner in which monies are to be secured to fund the mandated programs. This section provides a brief overview of the alternative approaches and

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41. *See, e.g.*, United States v. Chicago Bd. of Educ., 554 F. Supp. 912 (N.D. Ill. 1983)(approving settlement agreement with stipulated term of 5 years and mutual promises to identify and provide available resources).

42. *See, e.g.*, Bronson v. Board of Educ., No. 1-74-205 (S.D. Ohio filed June 22, 1984)(approving agreement obligating state to pay up to $35 million over 7 year period).

43. *See, e.g.*, Oliver v. Kalamazoo Bd. of Educ., 368 F. Supp. 143 (W.D. Mich. 1973)(initial remedial order) and 640 F.2d 782 and 823 (6th Cir. 1980)(denial of supplemental relief).

44. Berry, 515 F. Supp. at 386-87.

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provisions employed by federal district judges and guiding principles supplied by reviewing appellate courts.

Some remedial desegregation orders simply mandate the implementation of a prescribed plan of pupil reassignment and ancillary educational and enabling components; remaining silent with respect to the source and manner by which each party is to marshall the fiscal resources necessary to meet their respective obligations. In these cases, judicial reinvolvement may be predicated on a motion of one of the parties to compel enforcement of the prior order or the initiation of contempt proceedings against the noncomplying party. This judicially-constrained approach is the one that has been employed most frequently in desegregation cases.

The first line of defense to such narrow funding orders has historically been for the state to assert sovereign immunity predicated on the 11th Amendment and a violation of federalism principles embodied in the tenth amendment. In recent years, however, it has become well established that sovereign immunity does not bar prospective relief necessary to ensure compliance with constitutional obligations.[45] Similarly, the principles of federalism have been held not to be implicated by such a federal court order enforcing the equal protection clause.[46]

With increasing regularity, however, courts are becoming more involved in structuring the manner in which the necessary resources are marshalled to permit the effectuation of their orders. This is explainable in part by the expanding scope and escalating costs of remedial programs and the growing complexity of the party structure. The presence of multiple defendant parties, each of which may be held liable for one or more facets of an increasingly costly remedial program, inevitably invites more numerous and intense legal contentions. These in turn challenge the patience and restraint of the court that labors under an obligation to ensure the the implementation of a plan that "promises realistically to work and work now," an obligation that may have ripened years earlier in protracted litigation that has been characterized by dilatory tactics on the part of the constitutional wrongdoers. At the same time, as a result of such comprehensive orders the non-school district defendants are frequently confronted with a funding obligation for which there is no

45. Edelman v. Jordan, 415 U.S. 651 (1974) and Milliken v. Bradley, 433 U.S. 267 (1977). *See also Ex parte* Young, 209 U.S. 123 (1908) and Griffin v. Prince Edwards Cty., 377 U.S. 218 (1964). The Equal Educational Opportunity Act of 1974 may also serve as a waiver of immunity as to state education officials. Los Angeles Branch NAACP v. Los Angeles Unified School Dist., 714 F.2d 946 (9th Cir. 1983).

46. Milliken, 433 U.S. 267.

statutory authority or legally prescribed means for satisfying. These factors, along with others, have caused courts in some cases to resort to a more active role in managing the marshalling of remedial resources, notwithstanding a host of additional legal issues that such a role engenders.

Thus, rather than remaining silent regarding the means by and sources from which obligations are to be satisfied, courts have included in their orders various approaches to ensure the availability and adequacy of fiscal resources. In some instances courts have simply urged unconstrained fiscal problem solving by the parties; in other situations they have suggested to the parties a range of acceptable alternative courses of fiscally responsible action. Under other circumstances courts have prescribed a particular means by which the parties shall meet their financial obligations. And finally, on occasion, federal courts have themselves exercised extraordinary authority and taken actions usually reserved to other governmental authorities or the public at large. These measures, designed to fund remedial desegregation obligations, have included, with varying degrees of appellate approval: (1) the transfer or escrowing of certain school district funds or revenues;[47] (2) the reinstitution of a previously abolished school tax or the adoption of a new tax rate;[48] and even, (3) the temporary suspension of a state referendum rolling back taxes in an area affected by a court-mandated desegregation plan.[49]

As might be expected, it is in such instances that the issues of state sovereignty, federalism, and local control, as well as separation of powers, are most forcefully joined. Federal courts have frequently acknowledged the limitations imposed on their authority by these principles, particularly where their orders would restructure or materially intrude into the conduct of state and local governmental functions in areas as sensitive as taxation and finances. The narrowly circumscribed nature of federal judicial authority in these areas extends even to situations involving the remediation of unconstitutional segregation. This is illustrated by the stringent standard one district judge imposed on himself as a precondition to establishing even general parameters governing the rate of taxation adequate to support a metropolitan desegregation plan:

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47. Liddell, 491 F. Supp. 351, *aff'd*, 667 F.2d 643 (8th Cir. 1981) and Reed, 472 F. Supp. 623 (N.D. Ohio 1979).

48. Griffin, 377 U.S. 218; Evans v. Buchanan, 477 F. Supp. 982, *man. granted*, 582 F.2d 750 (3d Cir. 1978); and United States v. Missouri, 515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975).

49. Liddell, 567 F. Supp. 1037, *stay denied*, 717 F.2d 1180, *vacated and remanded*, 731 F.2d 1294.

> [A] federal court should not become involved failing a total abdication of responsibility [by the state] over a period of time such that further delay significantly jeopardizes constitutional rights.[50]

Space precludes a review of the several cases that have wrestled with the application of such a standard.[51] It is possible, however, to distill from these cases the nature of the inquiry and perspective employed by the appellate courts in evaluating whether the trial court acted within or outside the bounds of its authority in entering a particular type of funding order. Generally, the reviewing court seeks to ascertain whether the conduct of the trial court is characterized by the controlled exercise of equitable authority in light of the countervailing constitutional interests of the parties. Such controlled exercise of authority is generally illustrated by the trial court's systematic and measured attempt to ascertain and employ the least intrusive form of remedial order necessary to ensure the minimum level of constitutionally required resources. A synthesis of these cases also suggests the following hierarchy of judicial actions, organized from the least to the most intrusive and thus potentially violative of the rights of states and local governmental units to structure their own affairs.

1. Issue an order simply obligating the party(ies) to implement the constitutionally required remedial plan;

2. Stipulate the nature and amount of resources deemed essential to the remedy, leaving the means by which they are acquired to the discretion of the party(ies);

3. Suggest to the party(ies) the alternative, state-sanctioned mechanisms which might be utilized or new ones which might be enacted to generate the needed monies and provide a date by which they must select or create and utilize such a means;

4. Direct that a particular state-sanctioned method be employed and be permitted to operate as is normally prescribed, including electoral approval where provided for by law; or

5. Issue an order modifying or suspending certain provisions of existing state-established financing schemata or creating entire

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50. Evans, 477 F. Supp. at 1025.

51. Griffin, 377 U.S. 218; Evans v. Buchanan, 477 F. Supp. 982, *man. granted*, 582 F.2d 750 (3d Cir. 1978); and United States v. Missouri, 515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975).

new ones in order to assure the availability of the monies necessary to support the implementation of the constitutionally required remedy.

Thus the less intrusive the order and the more methodical the trial court's approach in moving to increasingly intrusive measures, the more likely the order will be sustained on appeal. Naturally, in applying such a standard of review, the appellate court may also take into account factors such as the seriousness of the condition to be remedied, the time which has already lapsed since the finding of a violation, the cooperation and past performance of the parties, and the expected duration of the extraordinary judicial action.

Conclusion

The contemporary remedial regime in school desegregation cases differs substantially from the largely negative injunctions issued in the immediate aftermath of *Brown*. In the intervening years since the Supreme Court set down its initial remedial guidelines, federal district judges have crafted increasingly detailed orders imposing broader and more affirmative duties on local school district defendants. With increasing frequency, particularly since the Supreme Court's decision in *Milliken*, federal courts have ordered comprehensive remedial plans incorporating a broad array of remedial educational programs and organizational enabling components, as well as the more traditional pupil reassignment provisions.

Paralleling this expansion of remedial decrees in school desegregation and other institutional reform actions has been the development of new principles and precedents pertaining to governmental liability for constitutional torts and civil rights infringements. These precedents have tended to tear away, at least partially, some of the traditional protections and immunities enjoyed by governmental authorities, making them more accountable for their policies and actions.

These two developments — the expansion of the remedial regime and the erosion of governmental immunities — converged for the first time in *Milliken* and set the state for a new genre of school desegregation actions. These actions concern themselves as much with educational and organizational considerations as with the question of pupil reassignment. They also focus public along with judicial attention not only on which governmental authorities are liable, but also on the means by which necessary resources are to be marshalled and the bounds of judicial authority in making such determinations.

To date, states have been the primary targets of such actions as plaintiffs and local boards of education seek to diversify the party

structure in order to spread the remedial costs more broadly. Based on their indirect as well as direct actions that contribute to purposeful segregation at the local school district level, state agencies and officials in just four states have been held liable for over $275,000,000 of prospective desegregation relief in recent years, excluding the nearly $100,000,000 incurred in a single year by another state under terms of a mandatory reimbursement statute.

Even though comprehensive remedial plans are taking hold and favorable theories of governmental liability are evolving to provide a broader base for their financing, the federal judiciary must nevertheless function within the bounds of equitable authority. The case law reflects the constrained nature of federal judicial authority to do more than order the implementation of a remedial plan and determine the liability of the respective parties. Only under carefully circumscribed conditions may the court proceed to dictate the source from or manner by which each party must meet its financial obligation. In this context, the controlled exercise of equitable authority is characterized by the trial court's systematic and measured attempt to ascertain and employ the least intrusive form of remedial funding orders necessary to ensure the minimum level of constitutionally required resources. A hierarchy of judicial actions organized according to their intrusiveness is also synthesized from the case law.

The implications of this evolving genre of desegregation actions are at once clear in some respects and unclear in others. Undoubtedly, future actions will continue to seek broad relief and involve multiple defendants in an attempt to provide an adequate fiscal foundation for plan implementation. More time is necessary, however, to determine the implications of these developments.

Will these comprehensive plans provide more effective and durable remedies? Will they serve as catalysts for educational reform and renewal in the affected school districts? Will states already held liable for substantial desegregation costs move promptly to adopt new monitoring, compliance and enforcement procedures to avert similar exposure in the future? Will other states take proactive measures to prevent the federal judiciary from establishing and administering ad hoc and uncapped desegregation aid programs funded with monies from their state's treasury? Will the federal government be named with increasing frequency as a defendant party and be made to bear the cost of undoing school segregation and related conditions attributable to segregatory public housing and loan policies which originated in Washington? Or do these plans, with their emphasis on educational quality rather than equality, represent a return to the policy of separate but equal in an increasingly segregated system of

public education? These are some of the issues which can be expected to receive increasing attention in this evolving area of law and policy.